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## Admiralty - Collision - Last Clear Chance

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ADMIRALTY—COLLISION—LAST CLEAR CHANCE—The *City of Calcutta* anchored in the navigation channel as an emergency precaution on a foggy night. The vessel was hit by a scow in tow of the tug *Brooklyn*, whose navigator had observed the anchored ship for ten minutes. The scow sank and its owner sought to hold the *City of Calcutta* liable for failure to get underway after the fog had lifted. *Held*, libel dismissed. Even if the *Calcutta* was remiss in not moving, no liability could attach because the *Brooklyn* had the last clear chance of avoiding the accident. *Arundel Corp. v. The City of Calcutta*, (E.D. N.Y. 1958) 172 F. Supp. 593. In another case, libellant's two tugs were trying to free their grounded barge by weaving and swinging across the navigation channel. Respondent's tug collided with the barge in an attempt to pass the other two tugs. The district court divided the damages equally because libellant was at fault in blocking the channel and respondent was at fault in trying to pass without signals when the danger was clear. On appeal by libellant, *held*, decree affirmed. Last clear chance is applicable in admiralty but not where the negligence of both

parties continues up to the moment of the accident. *Genac Towing Co. v. Richmond*, (5th Cir. 1959) 265 F. (2d) 466.

Last clear chance developed in the common law to mitigate the severe rule that contributory negligence completely barred a plaintiff from recovery.<sup>1</sup> In admiralty contributory negligence does not bar an injured party, but results in an equal division of damages. Therefore some admiralty courts have considered last clear chance inapplicable.<sup>2</sup> But division of damages holds the only slightly negligent party to his full share of the damages, a result which has been criticized as unnecessarily harsh.<sup>3</sup> Under these circumstances last clear chance would seem a proper means to exonerate the slightly negligent party. However, admiralty courts in applying last clear chance have rarely given this reason, but as in the *City of Calcutta* case have applied the rule simply on the basis of common law authority.<sup>4</sup> So long as some justification exists in terms of mitigation it is difficult to quarrel with these decisions.<sup>5</sup> But when damages can be apportioned according to the degree of fault no justification remains for the continued use of last clear chance.<sup>6</sup> Yet American non-admiralty courts which can apportion damages have not been unanimous in rejecting last clear chance.<sup>7</sup> The continued application of the rule is attributable to the idea that the rule is one of proximate cause; the person who had the last clear chance of avoiding the accident is said to be the sole cause of the injury and is therefore responsible for all damages.<sup>8</sup> The same result has been reached in some English admiralty cases decided after passage of the Maritime Convention Act,<sup>9</sup> which requires apportionment of damages.<sup>10</sup> These

<sup>1</sup> See James, "Last Clear Chance: A Transitional Doctrine," 47 YALE L.J. 704 (1938); MacIntyre, "The Rationale of Last Clear Chance," 53 HARV. L. REV. 1225 (1940).

<sup>2</sup> *Williamson v. The Carolina*, (E.D. N.C. 1958) 158 F. Supp. 417; *The Norman B. Ream*, (7th Cir. 1918) 252 F. 409.

<sup>3</sup> See *Tank Barge Hygrade v. Gatco New Jersey*, (3d Cir. 1957) 250 F. (2d) 485; *Oriental Trading & Transport Co. v. Gulf Oil Corp.*, (2d Cir. 1949) 173 F. (2d) 108; *Socony Vacuum Transportation Co. v. Gypsum Packet Co.*, (2d Cir. 1946) 153 F. (2d) 773. Except for the United States all leading maritime countries have adopted the maritime convention which provides for comparative negligence.

<sup>4</sup> *Crawford v. Indian Towing Co.*, (5th Cir. 1957) 240 F. (2d) 308; *The Sanday*, (2d Cir. 1941) 122 F. (2d) 325; *The Wattupa*, (2d Cir. 1941) 120 F. (2d) 766. See Cooper, "The Last Clear Chance Doctrine Is Applicable in Admiralty," 5 N.Y. LAW FORUM 278 (1959); Witsaman, "Last Clear Chance in Admiralty," 10 WEST. RES. L. REV. 286 (1959). See also the discussion of the reasons underlying the use of last clear chance in admiralty in *Genac Towing Co. v. Richmond*, (5th Cir. 1959) 265 F. (2d) 466.

<sup>5</sup> An exception is *Kosnac v. Norcuba*, (S.D. N.Y. 1956) 142 F. Supp. 377, where last clear chance was applied in order to divide the damages. This is clearly out of line with the cases which use last clear chance to exonerate one negligent party and throw the total loss on the other. The case was reversed on the ground that there was in fact no last clear chance and therefore no liability; *Kosnac v. Norcuba*, (2d Cir. 1957) 243 F. (2d) 890.

<sup>6</sup> See Prosser, "Comparative Negligence," 51 MICH. L. REV. 465 (1953).

<sup>7</sup> Cases are collected in 59 A.L.R. (2d) 1261 (1958).

<sup>8</sup> *Lovett v. Sandersville R. Co.*, 72 Ga. App. 692, 34 S.E. (2d) 644 (1945); *Chicago, M., St. P. & P. R. Co. v. Kane*, (9th Cir. 1929) 33 F. (2d) 866.

<sup>9</sup> 1 & 2 Geo. 5, c. 57 (1911).

<sup>10</sup> *The Kate*, [1936] 54 L.L. Rep. 120; *Anglo-Newfoundland Development Co. v. Pacific S.N. Co.*, [1924] A.C. 406.

English cases<sup>11</sup> have noted the striking similarity between a ship negligently anchored in a navigation channel and the hobbled donkey in the road in *Davies v. Mann*,<sup>12</sup> cited as the origin of the last clear chance doctrine. Neither ship nor donkey can avoid the impending collision; each is at the mercy of the moving object, which having seen the danger must take steps to avoid it. Failure to take such steps results in sole liability.<sup>13</sup> The exoneration of one negligent party in a comparative negligence jurisdiction should not, however, be made to rest on the application of a mechanical rule of proximate cause like last clear chance. A study of American, English and Canadian cases<sup>14</sup> shows, nevertheless, that where comparative negligence is imposed upon the courts by legislation, there has been a marked unwillingness to dispense with last clear chance.<sup>15</sup> Therefore, since a rational application of comparative negligence in admiralty seems desirable, two alternatives are available. Either the United States adopts the maritime convention with the understanding that the courts will no longer apply last clear chance, or the district courts judicially adopt comparative negligence in admiralty and simultaneously discard last clear chance. Since adoption of the maritime convention seems unlikely,<sup>16</sup> the district courts are urged to proceed with the second alternative. Doubt has been expressed about whether the lower courts have the power to put an end to the equal division rule.<sup>17</sup> But damage awards in admiralty are based upon enlarged principles of justice and equity and are within the discretion of the district court.<sup>18</sup> In addition to permitting equal division

<sup>11</sup> The *Kate*, note 10 *supra*; The *Eurymedon*, [1938] P. 41. Cases are collected and discussed in MARSDEN, *COLLISIONS AT SEA*, 10th ed., 21-34 (1953).

<sup>12</sup> 10 M. & W. 546, 152 Eng. Rep. 588 (1842).

<sup>13</sup> This same result was reached without the benefit of last clear chance in a French case where a trawler collided with a sailing vessel preparing to fish on a windless night without required lights. Since the sailing vessel had been sighted her negligence was not considered directly related to the collision. *Cameleyre v. Leduc*, D.H. 1928.317. Lawson comments upon this case as follows: "Although I am inclined to think it is in accord with the policy of the new [Law Reform (Contributory Negligence)] Act that the search for a last clear chance should entirely cease, I am bound to refer, not only to the statement of Esmein to the effect that French courts often neglect a slight negligence of one of the parties—which would not in itself be hostile to my thesis—but also to the case *Cameleyre v. Leduc*, which might be called the French *Davies v. Mann*." LAWSON, *NEGLIGENCE IN THE CIVIL LAW* 57 (1950).

<sup>14</sup> Cases from all three countries are discussed in 59 A.L.R. (2d) 1261 (1958). For specific countries, see Prosser, "Comparative Negligence," 51 MICH. L. REV. 465 (1953); MacIntyre, "Last Clear Chance After Thirty Years Under the Apportionment Statutes," 33 CAN. B. REV. 257 (1955); Lord Wright, "Contributory Negligence," 13 MOD. L. REV. 2 (1950); Goodhart, "The Last Opportunity Rule," 65 L. Q. REV. 237 (1949).

<sup>15</sup> Especially the experience under the Federal Employers Liability Act shows the unwillingness of the courts to abandon last clear chance after Congress imposed comparative negligence; *Chicago, M., St. P. & P. R. Co. v. Kane*, note 8 *supra*; *Deere v. Southern Pac. Co.*, (9th Cir. 1941) 123 F. (2d) 438, cert. den. 315 U.S. 819 (1942).

<sup>16</sup> See 4 BENEDICT, *ADMIRALTY*, 6th ed., 262 (1940) and 1959 Supp., 84; ROBINSON, *ADMIRALTY* 854 (1939).

<sup>17</sup> *Oriental Trading & Transport Co. v. Gulf Oil Corp.*, note 3 *supra*.

<sup>18</sup> *The Max Morris*, 137 U.S. 1 (1890).

of damages in collision cases,<sup>19</sup> the Supreme Court has allowed unequal apportionment in personal injury cases.<sup>20</sup> In the absence of any prohibition of unequal division for collision, the district courts have the power to apportion damages.<sup>21</sup> If they would exercise that power, the courts could cease using last clear chance to place the total loss upon one of two negligent parties.

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<sup>19</sup> *The Schooner Catharine v. Dickinson*, 17 How. (58 U.S.) 170 (1859).

<sup>20</sup> *Jacob v. New York City*, 315 U.S. 752 (1942); *Socony Vacuum Oil Co. v. Smith*, 305 U.S. 424 (1939); *The Arizona v. Anelich*, 298 U.S. 110 (1936).

<sup>21</sup> In *The Margaret*, (3d Cir. 1929) 30 F. (2d) 923 at 928, cert. den. 279 U.S. 862 (1959), the Third Circuit awarded damages  $\frac{1}{4}$ - $\frac{3}{4}$ , but later ordered a rehearing for the following reason: "Experiencing a growing doubt, *not* as to the power to make the order apportioning damages, but as to its conduct in not literally and respectfully following the moiety rule which the Supreme Court has from time to time applied, this court of its own motion, called for a rehearing on the sole question of division of damages." (Emphasis added.) Thereupon the court reinstated the lower court's divided damage decree. See also *Socony Vacuum Transp. Co. v. Gypsum Packet Co.*, note 3 *supra*. In the *William J. Tracy*, (D.C. N.J. 1952) 105 F. Supp. 910, damages were awarded  $\frac{2}{3}$ - $\frac{1}{3}$  without discussion of whether the district court had the power to apportion damages. This argument is further developed in Staring, "Contribution and Division of Damages in Admiralty and Maritime Cases," 45 CALIF. L. REV. 304 (1957).